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IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

IN RE THE PERSONAL RESTRAINT
PETITION OF:

IRVIN GREENE,

Petitioner.

NO. 43457-1-II (consolidated with
42263-8-II)

STATE'S RESPONSE TO PERSONAL
RESTRAINT PETITION

A. ISSUES PERTAINING TO PERSONAL RESTRAINT PETITION:

1. Must the petition be dismissed because it does not establish actual and substantial prejudice stemming from error of constitutional magnitude or a fundamental defect which inherently results in a complete miscarriage of justice?

B. STATUS OF PETITIONER:

Petitioner, IRVIN GREENE, hereinafter defendant, is restrained pursuant to a Judgment and Sentence entered in Pierce County Cause No. 10-1-02314-5, after being found guilty of one count of stalking and one count of felony harassment. CP 169-183. Defendant was sentenced to a high end sentence of 60 months. *Id.* The judgment was entered on June 17, 2011. *Id.*

1 Defendant filed a direct appeal. Defendant is alleging that “true threat” is an
2 essential element of the crime of harassment, and that the charging document and jury
3 instructions omitted an essential element of the crime of harassment. *See* COA # 42263-8.
4 The case is still currently pending before this Court. This Court had consolidated this
5 personal restraint petition with defendant’s direct appeal.

6 The petition is not time barred. The State has no information to dispute petitioner’s
7 claim of indigency.

8
9 C. ARGUMENT:

- 10 1. THE COURT SHOULD DISMISS THE PETITION AS
11 DEFENDANT HAS FAILED TO DEMONSTRATE ACTUAL
12 AND SUBSTANTIAL PREJUDICE STEMMING FROM AN
13 ERROR OF CONSTITUTIONAL MAGNITUDE OR ERROR
14 THAT DEMONSTRATES A MISCARRIAGE OF JUSTICE.

15 Personal restraint procedure has its origins in the State’s habeas corpus remedy,
16 guaranteed by article 4, section 4 of the State constitution. Fundamental to the nature of
17 habeas corpus relief is the principle that the writ will not serve as a substitute for appeal. A
18 personal restraint petition, like a petition for a writ of habeas corpus, is not a substitute for
19 an appeal. *In re Hagler*, 97 Wn.2d 818, 823-24, 650 P.2d 1103 (1982). Collateral relief
20 undermines the principles of finality of litigation, degrades the prominence of the trial, and
21 sometimes costs society the right to punish admitted offenders. These are significant costs,
22 and they require that collateral relief be limited in state as well as federal courts. *Id.*

23 In order to prevail in a personal restraint petition, a petitioner must meet an
24 especially high standard. A petitioner asserting a constitutional violation must show actual
25 and substantial prejudice. *In re Haverty*, 101 Wn.2d 498, 681 P.2d 835 (1984). The rule
that constitutional errors must be shown to be harmless beyond a reasonable doubt has no
application in the context of personal restraint petitions. *In re Mercer*, 108 Wn.2d 714,
718-721, 741 P.2d 559 (1987); *In re Hagler*, 97 Wn.2d at 825. A petitioner relying on

1 non-constitutional arguments, however, must demonstrate a fundamental defect, which
2 inherently results in a complete miscarriage of justice. *In re Cook*, 114 Wn.2d at 810-11.
3 Mere assertions are insufficient in a collateral action to demonstrate actual prejudice.
4 Inferences, if any, must be drawn in favor of the validity of the judgment and sentence and
5 not against it. *In re Hagler*, 97 Wn.2d at 825-26.

6 The petition must include a statement of the facts upon which the claim of unlawful
7 restraint is based and the evidence available to support the factual allegations. RAP
8 16.7(a)(2); *Petition of Williams*, 111 Wn.2d 353, 365, 759 P.2d 436 (1988). If the
9 petitioner fails to provide sufficient evidence to support his challenge, the petition must be
10 dismissed. *Id.* at 364.

11 The present petition falls well short of these demanding standards. As
12 demonstrated below, the defendant asserts that errors occurred but fails to establish actual
13 prejudice arising from error of constitutional magnitude, or a fundamental defect resulting
14 in a complete miscarriage of justice. As such, the petition must be dismissed.

15 A personal restraint petition must include a statement of the facts upon which the
16 claim of unlawful restraint is based **and** the evidence available to support the factual
17 allegations. RAP 16.7(a)(2); *Williams*, 111 Wn.2d at 365, (emphasis added). If the
18 petitioner fails to provide sufficient evidence to support his challenge, the petition must be
19 dismissed. *Williams*, 111 Wn.2d at 364. Affidavits, transcripts, and clerk's papers are
20 readily available forms of evidence that a petitioner may employ to support his claims. *Id.*
21 at 364-365. Bald assertions and conclusory allegations will not support the holding of a
22 hearing, rather they require the dismissal of the petition. *Id.*

23 The evidence presented to an appellate court to support a claim in a personal
24 restraint petition must also be in proper form. On this subject, the Washington Supreme
25 Court has stated:

1 It is beyond question that all parties appearing before the courts of this State
2 are required to follow the statutes and rules relating to authentication of
documents. This court will in future cases accept no less.

3 *In re Connick*, 144 Wn.2d 442, 458, 28 P.3d 729 (2001) *overruled on other grounds by In*
4 *re Goodwin*, 146 Wn.2d 861, 50 P.3d 618 (2002). That rule applies to pro se defendants as
5 well:

6 Although functioning pro se through most of these proceedings, Petitioner --
7 not a member of the bar -- is nevertheless held to the same responsibility as a
lawyer and is required to follow applicable statutes and rules.

8 *Connick*, 144 Wn.2d at 455. If the petitioner fails to provide sufficient competent
9 evidence to support his challenge, the petition must be dismissed. *Williams*, 111 Wn.2d at
10 364.

11 Defendant's petition raises five grounds for relief all related to a claim of
12 ineffective assistance of counsel in the pre-trial stages of his case. However, a review of
13 the entire record shows that trial counsel, special counsel and the court were all concerned
14 with protecting defendant's rights and there is no evidence of deficient performance or
15 prejudice. There is no error and defendant received effective assistance of counsel.

16 The right to effective assistance of counsel is found in the Sixth Amendment to the
17 United States Constitution, and in Article 1, Sec. 22 of the Constitution of the State of
18 Washington. The right to effective assistance of counsel is the right "to require the
19 prosecution's case to survive the crucible of meaningful adversarial testing." *United*
20 *States v. Cronin*, 466 U.S. 648, 656, 104 S. Ct. 2045, 80 L. Ed. 2d 657 (1984). When such
21 a true adversarial proceeding has been conducted, even if defense counsel made
22 demonstrable errors in judgment or tactics, the testing envisioned by the Sixth Amendment
23 has occurred. *Id.* The court has elaborated on what constitutes an ineffective assistance of
24 counsel claim. The court in *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S. Ct. 2574,
25 2582, 91 L. Ed. 2d 305 (1986), stated that "the essence of an ineffective-assistance claim is

1 that counsel's unprofessional errors so upset the adversarial balance between defense and
2 prosecution that the trial rendered unfair and the verdict rendered suspect."

3 The test to determine when a defendant's conviction must be overturned for
4 ineffective assistance of counsel was set forth in *Strickland v. Washington*, 466 U.S. 668,
5 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), and adopted by the Washington Supreme
6 Court in *State v. Jeffries*, 105 Wn.2d 398, 418, 717 P.2d 722, *cert. denied*, 497 U.S. 922
7 (1986). The test is as follows:

8 First, the defendant must show that the counsel's performance was
9 deficient. This requires showing that counsel made errors so serious that
10 counsel was not functioning as "counsel" guaranteed the defendant by the
11 Sixth Amendment.

12 Second, the defendant must show that the deficient performance
13 prejudiced the defense. This requires showing that counsel's errors were so
14 serious as to deprive the defendant of a fair trial, a trial whose result is
15 reliable. Unless a defendant makes both showings, it cannot be said that the
16 conviction . . . resulted from a breakdown in the adversary process that
17 renders the result unreliable.

18 *Id. See also State v. Walton*, 76 Wn. App. 364, 884 P.2d 1348 (1994), *review denied*, 126
19 Wn.2d 1024 (1995); *State v. Denison*, 78 Wn. App. 566, 897 P.2d 437, *review denied*, 128
20 Wn.2d 1006 (1995); *State v. McFarland*, 127 Wn.2d 322, 899 P.2d 1251 (1995); *State v.*
21 *Foster*, 81 Wn. App. 508, 915 P.2d 567 (1996), *review denied*, 130 Wn.2d 100 (1996).

22 *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 56
23 (1992), further clarified the intended application of the *Strickland* test.

24 There is a strong presumption that counsel have rendered adequate
25 assistance and made all significant decisions in the exercise of reasonably
professional judgment such that their conduct falls within the wide range of
reasonable professional assistance. The reasonableness of counsel's
challenged conduct must be viewed in light of all of the
circumstances, on the facts of the particular case, as of the time of counsel's
conduct.

Citing *Strickland*, 466 U.S. at 689-90.

1 Under the prejudice aspect, “[t]he defendant must show that there is a reasonable
2 probability that, but for counsel’s unprofessional errors, the result of the proceeding would
3 have been different.” *Strickland*, 466 U.S. at 694. Because the defendant must prove both
4 ineffective assistance of counsel and resulting prejudice, the issue may be resolved upon a
5 finding of lack of prejudice without determining if counsel’s performance was deficient.
6 *Strickland*, 466 U.S. at 697, *Lord*, 117 Wn.2d at 883-884.

7 Competency of counsel is determined based upon the entire record below.
8 *McFarland*, 127 Wn.2d, at 335 (citing *State v. White*, 81 Wn.2d 223, 225, 500 P.2d 1242
9 (1972)). The reviewing court must judge the reasonableness of counsel’s actions “on the
10 facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466
11 U.S., at 690; *State v. Benn*, 120 Wn.2d 631, 633, 845 P.2d 289 (1993), *cert. denied*, 510
12 U.S. 944 (1993). Defendant has the “heavy burden” of showing that counsel’s
13 performance was deficient in light of all surrounding circumstances. *State v. Hayes*, 81
14 Wn. App. 425, 442, 914 P.2d 788, *review denied*, 130 Wn.2d 1013, 928 P.2d 413 (1996).
15 Judicial scrutiny of a defense attorney’s performance must be “highly deferential in order
16 to eliminate the distorting effects of hindsight.” *Strickland*, 466 U.S., at 689.

17 First, defendant claims that his trial counsel was ineffective during a pre-trial
18 conference on July 8, 2010. Defendant claims that he and his counsel had a conflict
19 because if he did not take a plea deal charges would be added, that his due process was
20 violated, that his attorney client privilege was violated and that his right to counsel was
21 violated. However, the record shows that on July 8, 2010, an order was entered for an
22 examination at Western State Hospital under RCW 10.77. Appendix A. The order was
23 signed by defendant’s attorney of record showing that defendant did have the benefit of
24 counsel. *Id.* If defense counsel suspected a competency issue with defendant, then it is his
25 duty to ask the court for an evaluation. *See State v. Marshall*, 144 Wn.2d 266, 27 P.3d

1 192 (2001). This is to protect the due process rights of defendant. *See In re PRP of*
2 *Fleming*, 142 Wn.2d 853, 863, 16 P.3d 610 (2001). Defendant had the benefit of counsel
3 and there is no evidence that his due process rights were violated as the court followed case
4 law and the statute. The trial court even addressed this issue on the record on August 10,
5 2010 and made the determination that defendant was receiving effective and adequate
6 counsel. 8/10/10RP 5-6. Defendant does not challenge this finding. There is no evidence
7 of any deficient performance and defendant does not articulate any prejudice. Further,
8 defendant does not state how his attorney client privilege was violated nor does he indicate
9 any problems with the plea negotiation process. These statements are without any kind of
10 support. Because defendant's bald statements are not authenticated as required by
11 *Connick*, this Court should not consider this information. As noted above, bald assertions
12 are insufficient. Under the rule of *Williams*, this Court should dismiss these claims for a
13 lack of evidence. Defendant cannot show deficient performance or prejudice from the
14 conduct of his counsel on July 8, 2010.

15 Second, defendant alleges his speedy trial rights were violated because he was sent
16 to Western State Hospital. However, competency proceedings are excluded from the time
17 for trial computations. CrR 3.3(e)(1). Further, the order the competency exam was entered
18 on July 8, 2010 and the order regarding competency finding defendant competent was
19 entered August 3, 2010 so the competency process was dealt with very expeditiously. CP
20 7-8. There is no error so defendant cannot show a violation of any right or ineffective
21 assistance of counsel.

22 Third, defendant claims he received ineffective assistance of counsel when the
23 court appointed special counsel to protect his rights. Defendant also alleges as his fourth
24 ground that the proceedings on December 13, 2010 should not have been closed.
25 Defendant's trial counsel not only filed a motion to withdraw but also filed a motion that

1 defendant had forfeited his right to be represented by an attorney. 11/17/10RP 2, CP 31-
2 34. In an abundance of caution and to protect defendant's rights, the court ordered special
3 counsel to represent defendant in light of his trial attorney's motion. 11/17/10RP 4-6.
4 Special counsel then filed a motion in opposition to defense counsel's motion to forfeit
5 counsel. CP 45-59. Special counsel made a motion to seal defense counsel's motion
6 which was denied. 11/29/10RP 9. The trial court did reserve ruling on closing the
7 courtroom for the court to decide on the day of the actual hearing on the motion to forfeit
8 counsel. 11/29/10RP 9-10. On the date of the hearing, special counsel moved, on behalf
9 of defendant, to hold the hearing ex-parte in a closed courtroom since matters that fall
10 under attorney-client privilege would have to be discussed. 12/13/10RP 2-5. The request
11 was made with defendant's knowledge and consent. 12/13/10RP 5. Based on the
12 representations by counsel and after going through an analysis on the record, the trial court
13 determined that there was a compelling privacy interest in preserving the attorney client
14 privilege. 12/13/10RP 5-6. The trial court denied the motion in terms of having the
15 hearing ex-parte, and determined that having the hearing on the record was a better choice.
16 12/13/10RP 5. However, given the compelling privacy interest, the trial court did hold the
17 hearing concerning the defendant's forfeiture of the right to counsel in a closed courtroom.
18 12/13/10RP 6. The trial court then moved the matter to the end of the docket to avoid
19 excluding people from the courtroom, engaging in the least restrictive means possible.
20 12/13/10RP 7. At the conclusion of the hearing, it was determined that while trial counsel
21 was allowed to withdraw, defendant had not forfeited his right to counsel and the
22 Department of Assigned Counsel was required to appoint a new attorney for him. CP 60.
23 A review of this procedure does not show any ineffective assistance of counsel. The trial
24 court did everything it could to protect defendant's rights. The trial court appointed special
25 counsel when defendant's trial counsel filed a motion to not only withdraw but also for the

1 court to find that defendant had forfeited his right to any counsel. The special counsel who
2 was appointed did everything she could to not only protect defendant's right to counsel but
3 also his attorney client privilege. Further, the request to close the courtroom was with
4 defendant's knowledge and consent so he cannot now allege error on appeal. The trial
5 court and special counsel did everything to protect defendant's rights. Defendant has not
6 articulated and cannot show any deficient performance or prejudice. In fact, the record
7 shows a focus on protecting defendant and his rights and that the ultimate result was that
8 defendant retained his right to counsel. There is no error.

9 Finally, defendant alleges that he is still receiving ineffective assistance of counsel.
10 However, the trial proceedings in defendant's case have concluded and the case is
11 currently pending on direct appeal. It is not clear how trial counsel is deficient at this time
12 when defendant has appellate counsel and his case is proceeding on appeal. Defendant's
13 statement is a bald assertion unsupported by facts. The court should decline to consider
14 this ground.

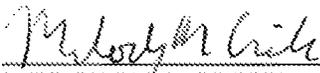
15 Defendant had failed to show any miscarriage of justice. The Court should dismiss
16 the petition as meritless.

1 D. CONCLUSION:

2 The petition must be dismissed because defendant has not shown either (1) actual
3 and substantial prejudice stemming from error of constitutional magnitude, or (2) a
4 fundamental defect, which inherently results in a complete miscarriage of justice.

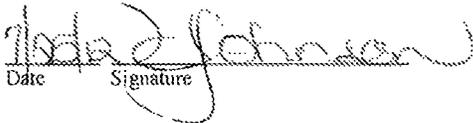
5 DATED: July 24, 2012.

6 MARK LINDQUIST
7 Pierce County
8 Prosecuting Attorney

9 
10 MELODY M. CRICK
11 Deputy Prosecuting Attorney
12 WSB # 35453

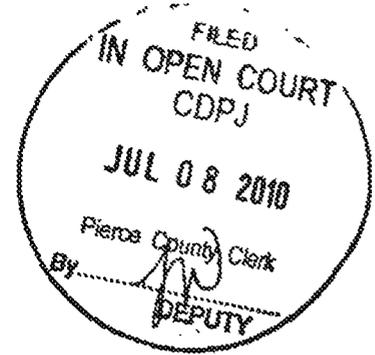
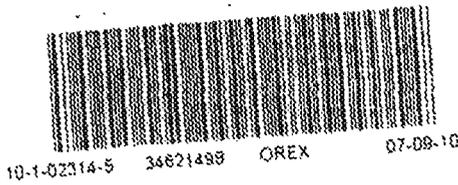
13 Certificate of Service:

14 The undersigned certifies that on this day she delivered by U.S. mail or
15 ABC-LMI delivery to the petitioner true and correct copies of the document to
16 which this certificate is attached. This statement is certified to be true and
17 correct under penalty of perjury of the laws of the State of Washington. Signed
18 at Tacoma, Washington, on the date below

19 
20 _____
21 Date Signature

APPENDIX “A”

Order for Exam



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SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON,)	
)	
Plaintiff,)	NO. 10-1-02314-5
vs.)	
)	ORDER FOR EXAMINATION BY
IRVIN GREENE,)	WESTERN STATE HOSPITAL
)	(15 Day Evaluation)
Defendant.)	
_____)	

THIS MATTER coming on in open court upon the motion of the defendant, and there may be reason to doubt the defendant's fitness to proceed and there may be entered a mental defense, and the court being in all things duly advised, now, therefore

IT IS HEREBY ORDERED under the authority of RCW 10.77.060, that the defendant, IRVIN GREENE, who is charged with the crime(s) of 5 counts of DV Court Order Violation be examined by qualified member(s) of the staff of Western State Hospital who are designated by the Secretary of the Department of Social and Health Services, including both psychiatrist and psychologist, if necessary. The examination may include psychological, and medical tests and treatment, and shall be completed as specified below.

1 [] **DEVELOPMENTAL DISABILITIES PROFESSIONAL:** The court has been
2 advised by a party to the proceedings that the defendant may be developmentally disabled and
3 hereby orders that one of the experts qualify as a developmental disabilities professional.

4 **PLACE OF EXAMINATION**

5 [] **A(1). PIERCE COUNTY JAIL.** IT IS HEREBY ORDERED that the examination
6 shall take place in the Pierce County Jail. If the evaluator determines that the examination
7 should take place at Western State Hospital, the Pierce County Sheriff's Department shall
8 transport the defendant to Western State Hospital, and at the end of such period of
9 examination and testing return the defendant to the custody of the Pierce County Jail. The
10 report is to be submitted to this court in writing within fifteen days of receipt of this order,
11 the charging documents and the discovery by Western State Hospital, unless the court
12 grants further time. If the defendant is released from jail prior to the examination, the
13 defendant shall contact the staff at Western State Hospital at (253) 761-7565 within the
14 next working day following his/her release from jail to schedule an appointment for
15 examination at a facility.

16 [] **A(2).** The defendant waives the statutory requirement of two experts if the
17 examination occurs in the Pierce County Jail.

18 [] **B(1). OUT OF CUSTODY.** IT IS HEREBY ORDERED that as the defendant is not
19 currently in custody, the defendant and/or his/her attorney shall contact the staff at Western
20 State Hospital at (253) 761-7565 within the next working day following the date of this
21 order to schedule an appointment for examination at a facility. The examination shall
22 occur, and the report submitted to this court, within fifteen days of the receipt of the order,
23 the charging documents and the discovery by Western State Hospital unless the court grants
24 further time.

25 [] **B(2).** The defendant waives the statutory requirement of two experts if the examination
26 occurs at a community facility.

27 ~~[]~~ **C(1). WESTERN STATE HOSPITAL.** IT IS HEREBY ORDERED that the
28 examination is to occur at Western State Hospital, following receipt by the Hospital of the
order, the charging documents, and the discovery. The defendant is hereby committed to
the care of the Division of Social and Health Services for up to fifteen days from the date of
admission to the hospital. Following the examination the defendant is to be returned to the
Pierce County Jail for further proceedings in this matter. The report shall be furnished to
the court in not less than twenty-four hours preceding the transfer of the defendant back to
jail.

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C(2). WESTERN STATE HOSPITAL TRANSPORTATION. In the event that the examination is to take place at Western State Hospital, IT IS FURTHER ORDERED that the Sheriff of Pierce County shall forthwith transport the defendant to Western State Hospital for the purposes set forth in the preceding paragraph and at the end of such period of examination and testing return the defendant to the custody of the Pierce County Jail to be held pending further proceedings against the defendant.

IT IS FURTHER ORDERED that the staff of Western State Hospital shall file the report with the undersigned Court, and provide copies to the Prosecuting Attorney, the Defense Counsel and others as designated in RCW 10.77.060 and 10.77.065.

NATURE OF EXAMINATION

The report of the examination shall include the following pursuant to RCW 10.77.060:

- A description of the nature of the examination;
- A diagnosis of the defendant's mental condition;
- COMPETENCY:** an opinion as to the defendant's capacity to understand the proceedings and to assist in defendant's own defense. This opinion is to include an opinion as to whether the defendant suffers from a mental disease, defect, or is developmentally disabled;
- SANITY:** an opinion as to the extent, at the time of the offense, as a result of mental disease or defect, the defendant was unable to either perceive the nature and quality of the acts with which the defendant is charged, or to know right from wrong with reference to those acts;
- DIMINISHED CAPACITY:** the capacity of the defendant to have the particular mental state of mind which is an element of the offense(s) charged, as listed below:
OFFENSE _____ MENTAL STATE _____
OFFENSE _____ MENTAL STATE _____
- An opinion as to whether the defendant is a substantial danger to other persons or presents a substantial likelihood of committing criminal acts jeopardizing public safety or security, unless kept under further control by the court or other persons;
- An opinion as to whether the defendant should be evaluated by a County Designated Mental Health Professional under RCW 71.05.
- The Staff is further required to give an opinion as to whether further examination and testing is required.

1
2 **IT IS FURTHER ORDERED** that the Staff of Western State Hospital is granted access to
3 the defendant's medical records, whether they are held by any mental health, medical,
4 educational, or correctional facility that relate to present or past emotional or physical condition
5 of the defendant for the purpose of conducting the examination.

6 **IT IS FURTHER ORDERED** that this action be stayed during this examination period
7 and until this court enters an order finding the Defendant to be competent to proceed. A
8 competency proceeding is scheduled for 27 July 2010 at 1:30 pm.

9 **DONE IN OPEN COURT** this 8th day of July, 2010.

12
13 JUDGE

14 Presented by:

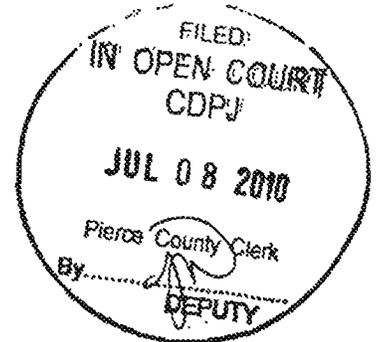
15 Aaron Talney
16 AARON TALNEY, WSBA #22154
17 Attorney for Defendant
18 Phone 798-7849
19 Fax 798-6715

Approved as to Form:

Bryce Nelson
BRYCE NELSON, WSBA #33142
Deputy Prosecuting Attorney
Phone: 798-6612
Fax 798-6636

18 Copy Received by:

19 In custody. Notified by atty
20 Defendant



State of Washington, County of Pierce ss: I, Kevin Stock, Clerk of the
aforementioned court do hereby certify that the document
SerialID: BF2528E2-F20D-AA3E-59D71678108AAFB2 containing 4 pages
plus this sheet, is a true and correct copy of the original that is of record in my
office and that this image of the original has been transmitted pursuant to
statutory authority under RCW 5.52.050. In Testimony whereof, I have
electronically certified and attached the Seal of said Court on this date.



Kevin Stock, Pierce County Clerk

By /S/BARBARA KNIGHTON, Deputy.

Dated: Jul 25, 2012 10:18 AM



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PIERCE COUNTY PROSECUTOR

July 25, 2012 - 10:37 AM

Transmittal Letter

Document Uploaded: prp2-434571-Response.pdf

Case Name: In re the PRP of: Irvin Greene

Court of Appeals Case Number: 43457-1

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

- Designation of Clerk's Papers Supplemental Designation of Clerk's Papers
- Statement of Arrangements
- Motion: ____
- Answer/Reply to Motion: ____
- Brief: ____
- Statement of Additional Authorities
- Cost Bill
- Objection to Cost Bill
- Affidavit
- Letter
- Copy of Verbatim Report of Proceedings - No. of Volumes: ____
Hearing Date(s): _____
- Personal Restraint Petition (PRP)
- Response to Personal Restraint Petition
- Reply to Response to Personal Restraint Petition
- Other: _____

Comments:

No Comments were entered.

Sender Name: Heather M Johnson - Email: hjohns2@co.pierce.wa.us